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IN THE

SUPREME COURT OF THE UNITED STATES

NO. A-247 (75-425)

VALARIE PRICE ..... PETITIONER

V.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *Valarie Price* v. *Commonwealth of Kentucky* is not reported and appears as Appendix "A" attached hereto.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. §1257(3), the proper provision for review of a state court judgment in a criminal case on certiorari.

The questions the petitioner attempts to present here under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States have never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

In *Columbia Water Power Co.* v. *Columbia Electric R.L. & P.Co.*, 172 U.S. 475, 43 L.Ed. 521, 19 S.Ct. 247 (1898), this Court in discussing jurisdictional requirements stated:

> "There is no doubt that under the third class the Federal right, title, privilege, or immunity *must be*, with possibly some rare exceptions, *specifically set up or claimed* to give this court jurisdiction." "Emphasis added.)

Rule 23-1(f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and

exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis added.)

A review of the record of the state court proceedings in the instant case shows that petitioner did not specifically set up or raise a federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655, 41 L.Ed. 1149, 17 S.Ct. 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rights rather than state rights. See *New York Central & Hudson River Railroad Co.* v. *New York,* 186 U.S. 269, 273, 46 L.Ed. 1158, 22 S.Ct. 916 (1901).

Furthermore, this Court has stated that if it is uncertain whether a claim is grounded on some provision of the State Constitution or on some provision of the Federal Constitution, it will be assumed that reference is being made to the State rather than the Federal Constitution. See *New York ex rel Bryant* v. *Zimmerman,* 278 U.S. 63, 67, 68, 73 L.Ed. 184, 63 S.Ct. 84 (1928).

The fact that petitioner cited United States Supreme Court cases in his briefs to the state court is neither sufficient to raise a federal question nor sufficient to establish jurisdiction. Jurisdiction cannot be founded by surmise. *Lynch* v. *New York ex rel Pierson,* 293 U.S. 52, 54 79 L.Ed. 191, 55 S.Ct. 16 (1934).

This application for writ of certiorari should be denied, because petitioner failed to set out or raise a federal question with sufficient definiteness so as to bring such question to the attention of the state courts and because petitioner failed to state whether his claim was grounded upon provisions of the Constitution of Kentucky or the United States Constitution.

Even if petitioner could be said to have raised a federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock* v. *Memphis,* 20 Wall 590, 22 L.Ed. 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

Notwithstanding that petitioner had properly raised in the state courts the question he presents here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. Thus, determination of the question that petitioner brings here was unnecessary by the state court in its decision of this case.

For the foregoing reasons, respondent submits that

petitoiner's application for certiorari should be denied because it fails to meet jurisdictional requirements.

QUESTIONS PRESENTED

I. **WHETHER THE CONVICTION OF THE PETITIONER WAS OBTAINED IN VIOLATION OF HER CONSTITUTIONAL RIGHTS AS GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES IN THAT THE COMMONWEALTH FAILED TO PROVE THE VALUE OF THE FURNITURE WHICH WAS THE SUBJECT MATTER OF THE INDICTMENT FOR GRAND LARCENY, WHICH FAILURE WAS A FATAL DEFICIENCY, AND FURTHER THAT THERE WAS A FATAL VARIANCE IN THE COMMONWEALTH PROOF OF ACTUAL OWNERSHIP OF THE FURNITURE, WHICH VARIANCE FAILED TO CONFORM TO THE CHARGES OF THE INDICTMENT RENDERED AGAINST THE PETITIONER.**

II. **WHETHER A MEMORANDUM OPINION OF THE KENTUCKY COURT OF APPEALS MEETS THE KENTUCKY CONSTITUTIONAL AND STATUTORY STANDARDS WHICH GUARANTEE THE RIGHT OF A CONVICTED PERSON AN APPEAL OF HIS CONVICTION, AND WHETHER THESE KENTUCKY PROVISIONS, ONCE ENACTED, ARE THEN GOVERNED BY THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION I, WHICH SHOULD REQUIRE EQUAL TREATMENT OF LITIGATION ON APPELLATE REVIEW.**

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section I of the Fourteenth Amendment to the Constitution of the United States of America provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 109 and 127 of the Constitution of the Commonwealth of Kentucky provide that:

> The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in the senate when sitting as a court of impeachment, and one supreme court (to be styled the court of appeals) and the courts established by this Constitution. (§109)

> The right to appeal or sue out a Writ of error shall remain as it now exists until altered by law, hereby giving to the general assembly the power to change or modify said right. (§127)

STATEMENT OF THE CASE

The petitioner was indicted on July 26, 1973 by the Jefferson County Grand Jury for dwelling house breaking in violation of KRS 433.180 and/or grand larceny in violation of KRS 433.220. Following entrance of a plea of not guilty, the case came on for trial on April 2, 1974. Petitioner was found guilty by jury verdict and sentenced to two years imprisonment. Following denial of petitioner's motion for a new trial, an appeal was perfected to the Kentucky Court of Appeals. Petitioner's conviction was affirmed by the Court of Appeals on November 22, 1974. The denial of her petition for rehearing, the instant petition for writ of certiorari was filed.

ARGUMENT

I

THE CONVICTION OF THE PETITIONER WAS NOT OBTAINED IN VIOLATION OF HER CONSTITUTIONAL RIGHTS AS GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

Although respondent submits that this petition for writ of certiorari does not meet the jurisdictional requirements of 28 U.S.C. 1257(3), he nevertheless submits that the petitioner was not denied the rights guaranteed her by the Fifth, Sixth, and Fourteenth Amendments of the federal constitution by virtue of the Commonwealth's alleged failure to prove the value of the property stolen or by an alleged variance in the proof as to the ownership of said property.

While it is difficult to determine precisely what action or inaction of the trial court it is which petitioner contends is reversible error, it must be assumed that the petitioner is complaining of the trial court's denial of a directed verdict of acquittal.

The prosecutrix, during her testimony, read a list of the furniture which was taken from her home and placed a value on this furniture of $14,954.17. During cross examination of the prosecutrix by the petitioner as to the value of the furniture taken the following exchange took place:

"278 Now, how did you determine those values? Did you have the property appraised at that time?

A. No, I didn't, but I know what we paid for it,

and I have some of the contracts on some of this stuff, too. My mother-in-law has them. She kept some of the papers for us because she was holding a lien on the furniture, also.

279 Did you determine those values on a market price? Just how did you determine the value that you testified before the Court?

MR. WOOLDRIDGE: If the Court please, the indictment says that the furniture is worth over a hundred dollars, and that's all we have to prove, and even though she testified what the value was, it really doesn't make any difference what it was valued at, so I object.

THE COURT: Well, that's correct. I assume the lady is basing the value of this on what it cost.

THE WITNESS: (Nodding head affirmatively.)

THE COURT: Some of it, I assume, also, was some years old, or was it all brand new?

THE WITNESS: Some of it was old.

THE COURT: You didn't take into consideration any depreciation or deducation —

THE WITNESS: (Interrupting) No, sir.

THE COURT: So, we can assume the $14,000.00 figure is a little bit inflated." (T.E., pp 61-62)

This is the only challenge made to the value placed

on the property by the prosecutrix. The petitioner introduced no testimony to contradict this valuation.

In discussing the test to be applied in determining the value of property in a grand larceny prosecution, the Court stated in *Beasley* v. *Commonwealth,* Ky., 399 S.W. 2d 179 (1960):

> "For the purposes of a grand larceny prosecution the value of the stolen property is not the original cost nor the sale price for junk, but the evidence of such cost or price is admissible as tending to establish the value. *Gray* v. *Commonwealth* 288 Ky. 25, 155 S.W.2d 444. The true criterion is the fair market value of the property at the time and place it was stolen, if there be such a standard market; if not, the value must be arrived at from the facts and circumstances and the uses and purposes which the article was intended to serve. *Gray* v. *Commonwealth,* supra; *Allen* v. *Commonwealth,* 148 Ky. 327, 146 S.W. 762. In other jurisdictions evidence of replacement cost has been held admissible in the absence of an established market value. See 52 C.J.S. Larceny §118, pp. 941, 942." at page 181.

In *Perkins* v. *Commonwealth,* Ky., 409 S.W.2d 294 (1966) the prosecuting witness in a grand larceny prosecution testified that the purchase price of the property stolen — a chain saw — was $169 a year prior to the theft and that it was in good condition. In response to Perkins' claim that the Commonwealth failed to prove that the value of the chain saw exceeded $100, the Court stated:

> "The Commonwealth had the duty to establish

> the market value at the time and place of the theft and, in the case at bar, it offered no evidence other than that mentioned. We believe that the jury could have reasonably concluded from that evidence that the market value was over $100. Juries as a rule would not have common knowledge of the value of such a saw, but the condition of the saw and its unquestioned purchase price just a year before formed an adequate basis for concluding that it was worth at least $100 at the time of the theft." at page 296.

Petitioner also contends that there is a variance between the wording of the indictment and the proof of what was stolen. Petitioner apparently objects to the inclusion in the list which the prosecutrix read at trial of certain items which petitioner feels are not furniture the theft of which the indictment charged.

Black's Law Dictionary, Revised Fourth Edition 1968, defines furniture as follows:

> "FURNITURE. This term includes that which furnishes, or with which anything is furnished or supplied; whatever must be supplied to a house, a room, place of business, or public building or the like, to make it habitable, convenient, or agreeable; goods, vessels, utensils, and other appendages necessary or convenient for housekeeping; whatever is added to the interior of a house or apartment, for use or convenience."

Thus under this definition there was no variance between the indictment and the proof at trial.

Respondent submits that the testimony of the prosecu-

trix as to the value of the stolen property was sufficient for the jury to have reasonably concluded that the market value at the time of the theft exceeded $100.

Petitioner also contends that the alleged variance between the indictment and the proof at trial as to the ownership of the stolen furniture is a fatal defect requiring that petitioner's motion for a directed verdict be sustained.

The indictment charged the theft of property belonging to Mrs. Edith White while proof at trial showed that some of the furniture belonged to her mother-in-law, La Fon White, although all of it was in Edith White's possession.

As stated in 50 AM Jur 2d Larceny §132:

> "It is well settled that the ownership may be laid either in the real owner or in the person in whose possession the property was at the time of the theft. The ownership may be laid in one who has the control, care, and management of the property."

This same rule has been in force in Kentucky at least since 1880 when it was stated in *Thomas* v. *Commonwealth,* 1 Ky. Law Rptr 407, 10 Ky. Op. 860:

> "The proof in the case was that the property belonged to the wife of Jas. S. Long, but that it was in the possession and under the control of the husband as agent for the wife at the time it was obtained by appellant. This, we think, was not a fatal variance. It is well established that where one holds property for another, as bailee, agent or in any other capacity

the property may be laid in the bailee or in the true owner." at page 680.

This rule stands to this day.

Respondent submits that whether or not Edith White was the owner of all the property taken is immaterial since it was uncontradicted that all of it was in her possession at the time it was taken.

Petitioner urges that states, like Kentucky, which employ grand juries in initiating criminal proceedings are bound by the Fifth and Sixth Amendments through due process clause of the Fourteenth Amendment, but alas she cites no authority for this contention.

The case of *Cole* v. *Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) upon which petitioner relies is inapposite since it involved a conviction on an information not on an indictment.

In disposing of this argument over one hundred years ago in *Jane* v. *Commonwealth,* 60 Ky. 18, 3 Metc 18 (1860) the Court stated:

> "This objection is easily disposed of. It has been decided by [22] the supreme court of Vermont that this 5th article of the amendments to the Constitution of the United States applies only to cases in the United States courts. (*State* v. *Keys,* 8 Vermont, 57). And certainly in many of the States this provision has not been regarded as imposing any restriction upon the power of the State Legislature to modify and even to abolish many of the formalities that were deemed essential, at common law, in

criminal proceedings. (See 2 Archbold's Crim. Practice, 206-7, and the notes.)

We have found no authority in conflict with the decision in Vermont, or in which the validity of the State legislation just referred to has ever been called in question. Upon principle as well as authority, therefore, the right of the State to declare what shall, and what shall not, be sufficient to constitute a valid indictment for a public offense, would seem to be beyond serious question."

II

A MEMORANDUM OPINION OF THE KENTUCKY COURT OF APPEALS MEETS THE KENTUCKY CONSTITUTIONAL AND STATUTORY STANDARDS WHICH GUARANTEE THE RIGHT OF A CONVICTED PERSON AN APPEAL OF HIS CONVICTION.

Respondent reasserts his belief that this petition for writ of habeas corpus is jurisdictionally defective and further submits that the petitioner was not denied due process or equal protection of the law by virtue of the form of the opinion rendered by the Court of Appeals of Kentucky. The states are not required by the United States Constitution to provide for appellate review. *Griffin* v. *Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). When a state chooses to provide appellate review, it must provide it for all persons equally. *Douglas* v. *California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

The Court of Appeals of Kentucky is the final authority on interpretation of the Kentucky Constitution and statutes. *Eisenstadt* v. *Baird,* 405 U.S. 438, 31 L.Ed.2d

349, 92 S.Ct. 1029 (1972). The Court has adopted various procedural rules to implement appellate review. Rule of the Court of Appeals, 1.310(b) provides that in cases which do not involve "any new or substantial point of law or any question of public importance" the opinions will not detail facts and will dispose of the issues in a summary manner.

In the case at bar the issues presented on appeal were evidentiary in nature. The Court of Appeals upon review of the record determined that these evidentiary questions were without merit and affirmed the judgment of the Jefferson Circuit Court. It is clear from the facts set out in petitioner's statement of the case that the decision of the Court of Appeals to render a memorandum opinion was in compliance with Rules of the Court of Appeals, Rule 1.310(b). It is obvious that there were no new or substantial points of law or any questions of public importance involved.

There are several other jurisdictions which have considered the constitutionality of memorandum opinions. In *Cichos* v. *State,* 210 N.E.2d 363 (Ind. 1965) the Court considered a case in which the appellant filed a petition for rehearing claiming that the Court had failed to comply with the state constitution by failing to give a statement of each question and decision thereon. In disposing of this contention the Court said:

> " * * * It is not that this court has presumed to disregard this constitutional provision, but since the provision is merely directive and does not involve any substantive rights of the litigants involved, we have given it a reasonable construction consistent with the

> obviously intended purpose thereof. Accordingly we limited our discussion to the principal contentions in the case which incidentally, were the issues discussed in oral argument. We intentionally omitted from our discussion those 'questions arising in the record' which seemed frivolous, were not supported by substantial argument in the briefs or were so patently contrary to the well-established law of the state since a discussion thereof would merely constitute an unjustifiable encumbrance of the reported decision of the state without making any contribution to the general body of the law." p. 364.

The Court of Appeals has determined that exhaustive opinions are not necessary in all cases and has accordingly adopted Rule of the Court of Appeals 1.310(b).

This Rule is applicable to all cases reviewed. The petitioner has failed to show that the Court of Appeals of Kentucky has failed to apply its procedural rule to all cases and therefore fails to support his contention that the Court of Appeals denied him due process and equal protection of the law by rendering a one sentence memorandum opinion.

CONCLUSION

The petitioner has failed to properly meet the jurisdictional requirement or to present a substantial federal question necessary for the consideration of the Court. For these reasons the petition for writ of certiorari should be denied.

Respectfully Submitted,

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of October, 1975, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari, by placing four copies of the same in the United States Mail, first class postage prepaid, and addressed to Joseph G. Glass, 118 South Fifth Street, Suite 100, Louisville, Kentucky 40202, Counsel for Petitioner.

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